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EMPLOYER INITIATED GRIEVANCE IN THE COLLECTIVE BARGAINING CONTRACT: A FRIENDLY VIEW

Herb Matthews*

INTRODUCTION

From the employer's viewpoint, collective bargaining is all too often a one way street favoring the union. Most clauses in the collective bargaining contract are viewed as providing burdens for the employer, not benefits: The employer shall pay specified rates; the employer shall not transfer employees between shifts, etc. The traditional exceptions to this general rule are the so called management's rights clause and the no-strike clause.

The management's rights clause is usually a broadly worded paragraph which attempts to spell out what the company can do in running its business.¹ But even this particular exception to the general rule as to burdens fails to appear in a great many collective bargaining contracts—often by design.²

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¹ *Management Rights Clause.* The management of the business and the direction of the working force, including but not limited to the right to direct, plan, and control plant operations, to establish or to change working schedules, to hire, promote, demote, transfer, suspend, discipline, or discharge employees because of lack of sufficient work or for other legitimate reasons, to make and enforce shop rules and regulations, to introduce new and improved methods or facilities, or to change existing methods or facilities, or to purchase supplies and service for the performance of its business, or to determine the products to be manufactured and the process and means of manufacture, are exclusively the right of the management of the company, and all other functions and prerogatives heretofore vested in and/or exercised by management, remain solely with management, and the union will not in any manner obstruct or abridge these rights; provided that none of the above provisions shall be used for the purpose of discriminating against any employee because of his or her membership in the union. Should a dispute arise concerning these management rights or responsibilities, but only to the extent that there is a conflict with a specific limitation expressed and identified in a provision elsewhere in this Labor Agreement, the dispute should be treated in accordance with the provisions of Article X (the grievance-arbitration procedure) of this Agreement.

² Some employers believe that they retain all rights except those specifically abridged or eliminated by the collective bargaining contract while other employers believe that it is not possible to list "all" of the management's rights and to merely list some is to risk falling into the trap of waiving many rights by specifying particular ones.

The no-strike clause, however, appears in almost every collective bargaining contract.³ Typically this clause provides that during the term of the collective bargaining contract, the union will not cause a work stoppage. Sometimes this obligation is elaborately stated.⁴ Some no-strike clauses provide that in the event of a work stoppage the union shall perform certain affirmative acts, such as posting a notice that the employees should cease the illegal strike and return to work.⁵ Frequently, the no-strike clause provides that it shall be "waived" if the employer fails to abide by the terms of the grievance procedure. Often too, the no-strike clause sets forth a promise by the employer that he will not lockout the employees during the term of the collective bargaining contract.⁶

Although rarely thought of as such, another clause that can be a benefit to the employer if properly used, is the grievance procedure. Grievance procedure clauses are found in most collective bargaining contracts.⁷ Typically they provide several "steps" for processing disputes, starting with a statement of the dispute at the plant floor level between an employee, or his shop steward, and the line foreman, and proceeding through a series of meetings between successively higher levels of union representatives and company officials, and ending in final binding arbitration.⁸ Indeed, in California, the existence of an agreement in a collective bargaining contract to arbitrate all disputes appears to imply a promise not to strike or lockout, even if no express promise to that effect is included in the collective bargaining contract.⁹ This has been the interpretation by the courts.¹⁰

³ The Bureau of National Affairs reports that some form of no-strike clause appeared in 94% of the collective bargaining contracts in 1960. 47 L.R.R.M. 33 (1960).

⁴ *No Strike—No Lockout*. The union agrees that neither it nor any of the employees in the bargaining unit covered by this Agreement will collectively, concertedly or individually engage in, instigate, support, condone or participate in, directly or indirectly, any strike, slowdown or stoppage of work during the term of this Agreement for any reason; and the company agrees that during the term of this Agreement it will not lock out any of the employees covered by this Agreement because of a labor dispute. The company retains the right to discipline or discharge any or all employees who violate this provision.

⁵ *Strikes and Lockouts*. In the event a strike occurs which is unauthorized by the union, the employer agrees that there shall be no liability on the part of the union, its officers or agents, provided that union shall, as soon as possible after notification by the employer that such action is unauthorized by the union, promptly take steps to return its members to work.

⁶ *Strikes and Lockouts*. During the term of this Agreement, there shall be no authorized strike by the union or lockout by the employer, provided the union and the employer abide by the provisions of the grievance machinery.

⁷ The Bureau of National Affairs reports that 99% of the collective bargaining contracts have grievance procedure. 46 L.R.R.M. 15 (1960).

⁸ 1 CCH 1966 Lab. L. Rep. ¶ 59,521.

⁹ *United Concrete Pipe Corp. v. Laborers', Local 89*, 231 Cal. App. 2d 315, 41 Cal. Rptr. 816 (1964).

¹⁰ *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).

It is the author's contention in this article that more employers should consider and use the grievance procedure clause as a "benefit"; using it to collect damages from the union if the union breaches the no-strike clause, and using it to force decision on unsettled and disputed issues which appear to be in the employer's favor. Later, ways are discussed by which this can be done. The opposing view advises the employer to stay out of the grievance procedure because if he is included, he waives his only effective remedy (injunction) for union breach of the no-strike clause, and would also lose the only effective deterrent (a large money judgment for damages) to such strikes.¹¹

BACKGROUND

An analysis of the issues involved in this problem must begin with an examination of the leading case of *Drake Bakeries, Inc. v. Local 50, American Bakery and Confectionery Workers*,¹² (hereafter cited as *Drake Bakeries*). In that case the United States Supreme Court ruled that the plaintiff employer's lawsuit against the defendant labor union for damages caused by the union's alleged breach of the no-strike clause in the collective bargaining contract between the parties should be stayed pending arbitration of the damage claim. The Court ruled that the grievance procedure clause in the collective bargaining contract was broad enough to cover the employer's claim, and since the employer had thereby agreed to settle his disputes with the union in the grievance procedure, the employer could not press his claim in court. In a companion case, *Atkinson v. Sinclair Refining Co.*,¹³ (hereinafter cited as *Atkinson*) decided the same day, the Court ruled that the union's motion for a stay of the plaintiff employer's damage suit was properly denied because the grievance procedure permitted only employee or union, not employer, claims, and therefore the employer could press his damage claim in court.

Unfortunately for the attorney representing employers, most grievance procedure clauses are not always as clearly written as the clauses in dispute in *Drake Bakeries* and *Atkinson*. They do not indicate clearly whether the employer has access to the grievance procedure or not.¹⁴ And, of course the answer to this question is cru-

¹¹ Lewis, *The Long Pause*, 14 LAB. L.J. 276 (1963); Spelfogel, *Enforcement of No-Strike Clause By Injunction, Damage Action and Discipline*, 17 LAB. L.J. 67 (1962); Stewart, *No-Strike Clauses in the Federal Courts*, 59 MICH. L. REV. 673 (1961).

¹² *Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionary Workers*, 370 U.S. 254 (1962).

¹³ *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962).

¹⁴ *Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionary Workers*, 370 U.S. 254, 264 n.13 (1962).

cial to the attorney representing the employer who is seeking relief from the union's breach of the no-strike clause. If the employer is excluded from the grievance procedure, *Atkinson* allows the employer to go to court for his damages. However, the time limits for filing a claim in the grievance procedures are usually of short duration compared to statutes of limitation for judicial action. If the employer has incorrectly sought judicial relief, and a union motion for a stay is granted, the employer's claim in arbitration may be untimely. Correct assessment of the employer's present status in the grievance procedure is also important to the employer's attorney in advising his client on what position to take in labor negotiation for a new contract. Whether the attorney adopts the view that the employer should be in or out of the grievance procedure, he will doubtless believe that this status should be clearly set forth. But, attempts to change technical language can be an expensive and frustrating exercise in collective bargaining—a field notorious for "standard language" and borrowed clauses. The experience is doubly frustrating if it is later found that the attempt was unnecessary. Yet the case law fails to furnish a certain guide—even with regard to "standard" language. However, Justice Douglas writing for the majority in the leading case of *United Steelworkers of America v. Warrior and Gulf Navigation Company*,¹⁵ tells us:

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

....

In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . .¹⁶

Former Solicitor General Archibald Cox writes that "The typical arbitration clause is written in words which cover, without limitation, all disputes concerning the interpretation or application of a collective bargaining contract."¹⁷ Not surprisingly then, courts decide, as did the District Court in *Franchi Construction Co. v. Local 560, International Hod Carriers*,¹⁸ that although the contract does not expressly provide for employer access to the grievance procedure and although this particular employer has never attempted to use the grievance procedure, nevertheless the agreement doesn't

¹⁵ *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

¹⁶ *Id.* at 582-3, 584-5.

¹⁷ Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247, 261 (1958).

¹⁸ 248 F. Supp. 134 (1965).

prohibit it, and in "my view [the court's] the grievance procedure is available to either side."¹⁹

BENEFITS AND RISKS OF EMPLOYER GRIEVANCES ANALYZED

As stated above, ominous warnings come from some attorneys representing employers that the employer should stay out of the grievance procedure. They advise that if the employer's present collective bargaining contract is ambiguous he should change it in the next negotiation to clearly provide that the grievance procedure is only for employee and union initiated grievances.²⁰ At the outset, it must be noted that negotiating such a change in the grievance procedure on the basis of such a technical argument is usually not a small task. Unions are likely to resist it, and the employer, who is frequently more concerned with immediate problems in collective bargaining such as wage rates and cost of fringe benefits than he is with technical issues, may not be willing to risk or take a strike today to safeguard his protection against a strike he may have some day in the future. Therefore, it is incumbent on the attorney advising the employer to pursue such a course to critically examine the reasons given.

The argument is made that employer access to the grievance procedure will preclude the employer from seeking injunctive relief from union breach of the no-strike clause. And if an injunction alone can effectively guard an employer's rights, this argument, if correct, is weighty indeed. The reasoning behind this argument runs thus: *Drake Bakeries* held that if an employer agreed to resolve all disputes he had with the union in the grievance procedure he is precluded from seeking judicial relief. But this argument goes beyond the *holding* in *Drake*, and views too narrowly the traditional basis for equitable relief. *Drake* merely held that the employer had to arbitrate his claim for damages because, simply stated, he had agreed to arbitrate all claims. *Drake* did not hold that the employer was foreclosed from seeking any and all types of judicial relief. Presumably, the employer in *Drake* could specifically enforce the union's obligation to arbitrate all claims and perhaps obtain a contempt citation if the union refused to comply.²¹ Moreover, equity has traditionally provided injunctive relief precisely in those situations where money damages, though available to the plaintiff, were an inadequate remedy. There is no obvious reason why this long stand-

¹⁹ *Id.* at 137.

²⁰ Spelfogel, *Enforcement of No-Strike Clause by Injunction, Damage Action and Discipline*, 17 LAB. L.J. 67 (1962).

²¹ *Sinclair Refining v. Atkinson*, 370 U.S. 195 (1962).

ing maxim should become meaningless because the damages are available in arbitration, rather than in court.

If the sole objection to having the employer in the grievance procedure is that the employer will be deemed to have waived his right to injunctive relief, the simple cure is careful wording of the collective bargaining contract. The following brief statement could be added to the no-strike clause: "In the event of a violation or alleged violation of this provision of this Agreement, the grievance and arbitration procedures of this Agreement shall not be the exclusive remedy therefor, and neither party to this Agreement shall be required, as a condition of maintaining any action at law or equity with respect to said violation or alleged violation, to process its claim or complaint for such violation under said grievance and arbitration procedures."

Another method the employer may use to insure the availability of injunctive relief from strikes in breach of a no-strike clause is to provide for such a procedure in the grievance procedure itself. In *Ruppert v. Egelhafer*,²² the New York Court of Appeals upheld a lower court's confirmation of an arbitrator's award which was a cease and desist order, in effect, injunctive relief. This rule is supported by the federal district court in *New Orleans Steamship Association v. General Longshore Workers*.²³ Provision for arbitrator's cease and desist orders could be obtained by adding such language as the following to the grievance procedure:

Whenever either party to this Agreement has a grievance in which he claims irreparable injury, he may appeal such grievance to Arbitrator John Doe who shall, within twenty-four hours from receipt of such a grievance, render a decision as to whether or not such a claim of irreparable injury is well taken. It is expressly agreed by the parties that said Arbitrator may issue such a cease and desist order as he finds appropriate, and that the claiming party may have such order confirmed in the appropriate court of law having jurisdiction over this matter. Provided, however, that Arbitrator John Doe shall assess the cost of such decision, including his fee, against the party making such claim if the Arbitrator declines to grant the relief requested.

This clause not only provides an effective remedy for strikes in violation of the no-strike clause, but it also vitiates the most frequently stated reason for such strikes—ineffective or sluggish alternative remedies. The provision allowing the arbitrator to assess the costs of unsuccessful resorts to this procedure could serve as a deterrent to either party resorting to it for purely frivolous or "face saving" purposes.

²² 3 N.Y.2d 576, 170 N.Y.S.2d 785 (1958).

²³ 49 L.R.R.M. 2941, 44 CCH Lab. Cas. ¶ 17,575 (D. La. 1962).

Another objection raised to employer access to the grievance procedure is that the threat of a large money judgment obtained in court against a union for breach of the no-strike clause is the only effective deterrent to such breaches.²⁴ This objection is usually based on a claim that arbitrators will not, in comparison to courts, award sufficient damages to make the employer whole, nor will they award punitive damages. Before these claims are examined, however, it should be pointed out that judgments in court, not arbitrator's awards, may actually be the will-o'-the-wisp. An employer whose business has been halted by a strike may be angry enough, at first, to vigorously pursue his damage remedy. But it is a well known fact that the vast majority of the damage suits filed in these cases are quietly withdrawn as a part of the settlement of work stoppage. Very few are fought through the long trial and the almost inevitable appellate procedure. Employers are simply more interested in operating their business than they are in pursuing fleeting legal remedies. A local union, on the other hand, has no real choice but to fight all the way. The only way it can call off the legal battle is to effect a money settlement, usually a politically impossible choice. Furthermore, the local can usually rely upon considerable legal and monetary assistance from its International and perhaps the AFL-CIO. For these reasons, realistically speaking, the legal remedy is of limited value to the employer.

One problem that the attorney faces when seeking to obtain equitable relief to end a strike in breach of the collective bargaining contract and obtain damages in court for the breach is the rule established by *Sinclair Refining Co. v. Atkinson*.²⁵ The Court there ruled that the Norris-La Guardia Act²⁶ deprived federal courts of jurisdiction to issue an injunction against such a strike, although section 301 of the Labor Management Relations (Taft-Hartley) Act²⁷ allowed federal courts to award damages in such a law suit. But state courts have concurrent jurisdiction to entertain such a suit.²⁸ California courts appear able to issue an injunction as well as grant relief in damages.²⁹ Therefore it becomes obvious that the employer's attorney will look to the state, rather than the federal court, so that he can obtain injunctive relief as well as his monetary damages. But in that state court he will be met by defendant union's attorney who

²⁴ Lewis, *The Long Pause*, 14 LAB. L.J. 276 (1963); Spelfogel, *Enforcement of No-Strike Clause by Injunction, Damage Action and Discipline*, 17 LAB. L.J. 67 (1962).

²⁵ 370 U.S. 195 (1962).

²⁶ 47 Stat. 70 (1932); 29 U.S.C. § 104 (1958).

²⁷ 61 Stat. 156 (1947); 29 U.S.C. § 185 (1958).

²⁸ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

²⁹ *McCarroll v. Los Angeles County Dist. of Carpenters*, 49 Cal. 2d 45, 315 P.2d 322 (1957); *Gage Plumbing Supply Co. v. Local 300, International Hod Carriers*, 202 Cal. App. 2d 197, 20 Cal. Rptr. 860 (1962).

will inform him that the action, since it could have originally been brought in federal court, is now by defendant's motion being removed³⁰ to federal court where the injunction will fail. One possible way out is for the employer's attorney to forego his claim for damages, enter the state court and request only injunctive relief, availing himself of the argument that the injunctive relief could not have been brought in the federal court in the first place because section 4 of Norris-La Guardia states that federal courts lack "jurisdiction" to issue such relief.³¹ Thus it is apparent that the employer seeking both can obtain either equitable relief or a law suit for damages, but not both. On the other hand, an attorney representing an employer who had access to the grievance procedure may seek an equitable relief from the immediate impact of the strike, and later attempt to recover his damages in the grievance procedure.

Contrast the involved and exhausting route sketched above of an employer law suit for damages in court with the procedure obtaining in an employer grievance under the collective bargaining contract. As pointed out above, the time periods in the steps in the grievance procedure are very brief. If the union resists, the California Code of Civil Procedure, sections 1280 through 1293 afford summary proceedings for the enforcement of the obligation to arbitrate, the naming of an arbitrator, the procedure to be followed in arbitration, and the confirmation of the award. The award, once confirmed, is subject to attack only on very limited grounds. Moreover, it is difficult in a psychological sense for either party to resist submitting a dispute to arbitration. This is the forum they are familiar with. Arbitrators, in a sense, set the ground rules in the industrial world.

Moreover, it is now well settled that arbitrators, absent an express contractual provision to the contrary, can and do award employers compensation damages for union's breach of a no-strike clause.

As for the claim that arbitration awards are skimpy as compared to court judgments, it must be noted that arbitrator's awards in this area are relatively recent events, and like any other body of precedent must be nurtured and cultivated. The word formula for computing and measuring damages are the same in arbitration as they are in the judicial forum.³² Cases of this nature that are actually tried in court and reported in appellate proceedings must

³⁰ 28 U.S.C. § 1441 (1958).

³¹ See Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 COLUM. L. REV. 1027 (1963); and Report of the Committee on State Labor Legislation, Labor Relations Law Section, American Bar Association (1965 Proceedings).

³² *American Pipe & Constr. Co. v. Int'l Bhd. of Boilermakers*, 65-2 A.R.B. § 8480 (1964).

be, by the nature of the trial and appellate process, "big cases." Conversely, the smallest sort of money award in arbitration will be reported if the issues involved are anything but run of the mill. Interestingly, a large award may not be published at all because one of the virtues of arbitration is the lack of notoriety if the parties desire to avoid it. Typically an arbitrator will not submit his award and decision to the publishing services unless both parties consent to it. And surprisingly, a very recent award allowed exemplary damages,³³ though the same are not recoverable in court for a suit for breach of the no-strike clause.³⁴

One of the greatest benefits that the employer can obtain by using the grievance procedure has little or nothing to do with obtaining an award that compensates him for damages, but frequently involves a great deal more money than many damage claims—whether in arbitration or in court. This benefit is the opportunity to use the grievance procedure to obtain a decision on an unsettled but controversial matter. Consider one particular arbitration, *American Pipe & Construction Company*.³⁵ There, although the Company filed a grievance for damages and collected a modest sum, the Company also filed a grievance and received a decision on a controversial issue of contract interpretation. This controversial question touched off the strike in the first place, but apparently the union involved chose not to file a grievance and process its claim through arbitration. Instead, the union chose to enforce its position by a work stoppage in violation of the collective bargaining agreement. The arbitrator ruled that the Company's position on the contract interpretation issue was correct—which may be why the union didn't file a grievance in the first place. In any event, the issue was settled in favor of the employer. The particular contract involved was a master agreement covering hundreds of employees doing field construction work in eight Western states, and if the employer had lacked access to the grievance procedure, the controversy might still be going on—being fought out or bluffed out one job at a time! Similar unpublished cases have been decided by other employer grievances. One involved the right of an employer to assign an employee in an intermediate pay grade to do work the union claimed could only be done by a journeyman.³⁶ Another involved a union claim that journeymen who had traditionally furnished their own tools could, in concert,

³³ *Wanzer v. Teamsters, Local 753*, 249 F. Supp. 664 (N.D. Ill. 1966).

³⁴ *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3d Cir. 1962).

³⁵ 65-1 A.R.B. § 8480 (1964).

³⁶ *California Metal Trades Association on behalf of M. Greenberg's Sons*. Arbitrator Howard Durham (May 17, 1966).

refuse to continue this practice.³⁷ In neither case was the union willing to test its theory by filing a grievance, but the employer was able to push the issue into grievance and have the issue determined in final and binding arbitration. In both of these latter cases the employers were able to have the issue decided without a work stoppage. In both the risk of a strike was exceedingly great if the employer had followed the more traditional procedure of making the assignment and daring the union to file a grievance, or had taken disciplinary action against the recalcitrant journeymen who refused to continue using their own tools.

Disciplinary action against employees has often been suggested as the means of enforcing the no-strike clause. One commentator suggests that the employer delete the no-strike clause and the arbitration clause because sometimes arbitrators will set aside or modify the disciplinary action the employer takes against employees for violating the no-strike clause.³⁸ This problem can be avoided and the no-strike clause retained by providing by contract that those employees who violate the no-strike clause will be deemed to have quit their employment. This in effect allows the arbitrator to find facts, *i.e.*, did the employee violate the clause or didn't he, rather than review a typical discharge case and thereby decide, on policy grounds, whether or not the employer's actions were "fair" or amounted to "just cause." But disciplinary action against employees is an even more illusory remedy for an employer than a law suit against the union. Frequently the employees are not at fault, in the sense that it is the union which has the quarrel (rightly or wrongly) with the employer over some matter of contract interpretation. How attractive is a remedy which provides that the employer will fire most or all of his employees? Of course, the employer, theoretically, at least, would have the right to hire replacements.³⁹ But this may be impossible. It will almost certainly be expensive, and it will probably be distasteful.

CONCLUSION

The debate over employer grievances is far from ended. However the advantages to the employer of having this tool at his disposal have so far largely been overlooked. The advantage of being able to collect, in a summary proceeding in a forum that the union itself favors, injunctive relief and a damage claim against the union, plus the advantage of being able to force a decision on long smoulder-

³⁷ Ampex Corporation, Arbitrator Sam Kagel (November 5, 1964).

³⁸ Lewis, *The Long Pause*, 14 LAB. L.J. 276 (1963).

³⁹ NLRB v. Columbia Enameling & Stamping Co., 96 F.2d 948 (7th Cir. 1938).

ing but unresolved issues (and perhaps thereby avoid breaches of the no-strike clause) are very real and practical. By contrast, the disadvantage of the employer having access to the grievance procedure—risk of jeopardizing the availability to the employer of equitable relief and loss of the money damages remedy in court—are either speculative, as in the case of injunctive relief, or illusory as in the case of a damage suit. Either or both claimed disadvantages to use of the grievance procedure can be overcome by astute draftsmen of the collective bargaining contract.